

**THE INDIANA CIVIL RIGHTS COMMISSION  
311 West Washington Street  
Indianapolis, Indiana 46204**

**STATE OF INDIANA    )  
                                  )  
COUNTY OF MARION )**

**EDWARD C. SAMPLE, JR.,  
Complainant,**

**DOCKET NO. 08465**

**vs.**

**INTERNATIONAL HARVESTER CO.,  
Respondent.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Comes now Robert D. Lange, Hearing Officer for the Indiana Civil Rights Commission ("ICRC") and enters his Recommended Findings of Fact, Conclusions of Law, and Order (hereinafter "the recommended decision"), which recommended decision is in words and figures as follows:

**(H.I.)**

And comes not any party filing objections to said recommended decision within the ten (10) day period prescribed by IC 4-22-1-12 and 910 IAC 1-12-1(B).

And comes now ICRC, having considered the above and being duly advised in the premises and adopts as its final Findings of Fact, Conclusions of Law, and Order recommended by the Hearing Officer in the recommended decision, a copy of which is attached hereto and incorporated by reference herein.

**Dated: February 12, 1992**

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**EDWARD C. SAMPLE, JR.,  
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**vs.**

**INTERNATIONAL HARVESTER CO.,  
Respondent.**

**RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Portions of the evidentiary hearing in the above entitled cause were held on four (4) days – September 30, 1981, October 20, 1981, December 9, 1981, and December 10, 1981. On all four (4) days, Complainant Edward c. Sample, Jr. was present and represented by counsel, Mr. Larry A. Steele, of the Fort Wayne law firm of Clifford & Steele, while Respondent International Harvester Company (“IH”) was represented by counsel, Mr. Milford M. Miller of the Fort Wayne law firm of Livingston, Dildine, Haynie & Yoder. Witnesses were sequestered and counsel for IH was permitted to designate a representative of IH to assist him. On all four (4) days, the designated representative was Mr. Roger D. Bartholow, Manager of Human Resources.

Having considered the evidence introduced at the Hearing, both oral and documentary, the arguments of counsel, and being duly advised in the premises, the Hearing Officer now recommends that the Indiana Civil Rights Commission enter the following Findings of Fact, Conclusions of Law, and Order:

## **FINDING OF FACT**

1. Complainant Edward C. Sample, Jr. ("Sample") is a Negro (hereinafter referred to as "black") male who, at all relevant times resided within the State of Indiana.
2. Respondent International Harvester co. ("IH") is a corporation doing business in the State of Indiana. Its Fort Wayne Truck Manufacturing facility, which this case concerns, is located on Coliseum Boulevard in Fort Wayne, Indiana and has, at all time relevant hereto, employed six (6) or more persons for wages or salary. (Unless specifically noted otherwise, all further references to IH are to this facility.)
3. Sample was hired by IH in August of 1972 and commenced his employment there on August 28, 1972. When first employed, Sample worked in Department 38, where he stayed for about four (4) months. Sample then chose to transfer to Department 51, the Machine Shop, where he worked for about two (2) years as a Machine Operator. Sample then transferred voluntarily to Department 16, the Axle and Wheel Department, where he worked with the exception of a layoff of approximately eight (8) months' duration, until his termination.
4. Sample's complaint against IH was filed with the Indiana Civil Rights Commission ("ICRC") on January 10, 1977 and, as amended, alleges discriminatory practices in (a) the manner and payment of wages, (b) the manner and circumstances of Sample's discharge on July 26, 1976, and (c) disparate treatment between Sample and Caucasian (hereinafter "white") employees discharged under similar circumstance with respect to IH's rehiring practices.
5. IH was shut down for vacation or other reasons from July 2, 1976 through July 18, 1976, fell on a Friday and was the date on which the Fourth of July holiday was observed pursuant to IH's Collective Bargaining Agreement with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, Local Union No. 57 (hereinafter "Local 57"). The remaining portion of the shutdown was for vacation and/or weekends.

6. Two or three weeks prior to the shutdown, after receipt of his weekly paycheck, Sample came to the conclusion that he had not been paid for both overtime and regular time which he had worked.
7. Sample mentioned this perceived pay shortage to his immediate supervisor, Bill Bruns ("Bruns") on several occasions, before and after the shutdown.
8. Sample also discussed the claimed shortage on more than one (1) occasion with Lowell Zumbrun ("Zumbrun"), the Union Steward of Local 57 assigned to represent union members, including Sample, in Department 16.
10. Thompson reviewed the check stub and referred it to the factory payroll group., where it was compared against time cards and other records.
11. Thompson discussed the claimed shortage on at least one (1) occasion with Whitey Shafer ("Shafer"), a Committeeman with Local 57.
12. Thompson also discussed the claimed shortage with Zumbrun on at least one (1) occasion. Sample was present during a discussion between Thompson and Zumbrun in which Thompson indicated he would take care of it. While it is apparent that Thompson meant that he would look into the matter further or ask someone else to do so, Sample took it to mean that Thompson agreed that Sample had been shorted and that Thompson would see that he got paid.
13. On July 26, 1976, Sample came into Department 16 where Thompson was meeting on an unrelated matter with Zumbrun and J. Goldsmith ("Goldsmith"), Department 16 alternate Committeeman and began discussing his perceived pay shortage. Sample stated that *"I am tired of being fucked on my pay and tired of being fucked by this department" and tired of "being fucked around,"* Thompson directed Sample to leave and that he would not permit that type of language to be used.
14. Nonetheless, Sample returned shortly, using similar language. This time he added that *"I don't have to take this white supremacy from you or anyone."* Thompson again directed Sample to leave the office.

15. After Sample left, Thompson advised Zumbrun and Goldsmith that if Sample persisted in acting in that manner that he would be dismissed on the spot.

16. Neither Thompson, Zumbrun, Schaefer, or anyone on the factory payroll group ever found any reason to believe Sample had ever received a paycheck which paid him for less regular time hours and/or overtime hours than he had in fact worked.

17. Sample believes he eventually received the money due him in checks he received after his discharge, which discharge occurred on July 26, 1975. Thus, even under Sample's view of the evidence, he lost no wage.

18. There is no evidence that Sample was not paid at the time due for regular time he actually worked or for overtime he actually worked.

19. Sample also contended that he was charged with having taken "paid absence" when he had not been absent.

20. The paid absence program allowed an employee to take a certain number of hours as paid absence during the year. Hours used as paid absence reduce the number of hours for which an employee is paid during vacations. On the other hand, paid absence allows an employee to be paid for work days s/he did not work, for which s/he would otherwise not be compensated at all.

21. There is no evidence that Sample was ever charged with having taken paid absence when he was in fact present. While it does appear that the employee's signature on the 1975 Paid Absence Allowance or Paid Absence Record (the lower portion of Respondent's Exhibit D) is not Sample's, this does not establish that Sample was not absent on the dates recorded on this form is within the period during which Sample contended the shortage occurred.

22. Sample also testified that Bruns had written "shortage" on the back of one check stub. Though no such check stub was produced, a check stub bearing Bruns' writing on the back was introduced as Complainant's Exhibit K. Written on the back of the stub, for the week ending June 6, 1976, is: Worked 5 days why 32?", 32 referring to the portion of the stub showing "Hrs. worked this wk." (This discrepancy is more apparent than real. The week ending June 6, 1976,

included may 31, 1976, which was Memorial Day. Sample himself testified he only worked four (4) day that week. Thus though Sample was paid for forty (40) hours, eight (8) of those were for Memorial Day. He actually worked thirty-two (32) hours, which is what the stub shows.)

23. There is no evidence that the problems Sample perceived regarding his paychecks, whether real or imaginary, had anything to do with race.

24. Sample's last position in Department 16 was as an A-36 assembler. His job involved assembling certain valves and attaching them to differentials passing down the assembly line.

25. Specifically, Sample's job was to install certain "sensors" in the valves, attach the appropriate valve to a bracket which he had to first remove from the passing differential, and then reattach the bracket with the valve attached thereto to the differential. The installation of the sensors is not significant to resolution of this case.

26. One of the trucks assembled by IH at the time was referred to an "IH Bogey" (spelling phonetic). This truck was to be equipped with a Quick Release Valve (also called apparently synonymously, a PD Valve), the function of which is, as the name implies, to release quickly the air in the brake system upon depressing the brake pedal. The brakes would then "catch". Absence or malfunction of this valve would result in lengthier braking time and distance as the air would be released more slowly.

27. During the last several weeks of Sample's employment, he experienced several problems in removal and reinstallation of the bracket, with the valve attached, on IH Bogeys. Those were:

- a. Incorrect bolt patterns, and
- b. Broken or otherwise inadequate tools to perform the task, and
- c. "Locktite" (spelling phonetic) in the bolt holes, making removal difficult.

28. Sample spoke to Bruns on more than one (1) occasion regarding the incorrect bolt pattern problem. Eventually, Bruns called in the engineering department. This resulted in the elimination of the problem of the incorrect bolt pattern prior to the date of Sample's discharge.

29. "Locktite" (a trade, or brand name) is a sealing solution, in effect a liquid gasket, utilized at an earlier point in the assembly to prevent leakage of fluid from around various points where parts of the differential were bolted together.

Occasionally, Locktite got into the bolt holes where the two (2) bolts Sample had to remove were, though the assembly process did not call for Locktite there.

30. Normally, Sample used an air gun provided by IH to remove "his" two (2) bolts; however, if Locktite had gotten into the holes and had time to set, the air gun would not remove the bolts.

31. Sample advised Bruns of this problem. Bruns took two (2) steps in response. First was to secure for Sample, a socket and ratchet with which to remove the bolts. (The testimony only mentioned a socket. It must be assumed that a ratchet was also provided as a socket without a ratchet would be even more ineffectual than an air gun.) The other was to confer with Department 48 (which was where the Locktite was used to ask that more care be used to avoid getting the solution into those two (2) bolt holes. Clearly, the first step was intended to allow Sample to remove those bolts where Locktite already was and the second was intended to prevent the problem in the future.

32. Subsequently, Sample advised Bruns that the socket and ratchet were not sufficient to remove the bolts. He was then given a "breaker bar". [A "breaker bar" is not necessarily a specially designed tool but is an implement of any sort which can be hooked or attached to the ratchet (which, of course, is attached to the socket) in such a way as to make the handle longer, thereby giving the user greater leverage. A hollow piece of pipe and a "box-end" wrench are each examples of items which can serve as "breaker bars".]

33. Utilizing these tools, Sample was, with the aid of the repairman, able to perform his duties so long as IH Bogeys were run no more frequently than every fourth or fifth differential. (The repairman's primary function was to fix things incorrectly done earlier. S/he could, and did, when time permitted, perform tasks earlier omitted altogether.)

34. Sample had absolutely no control over the order of production and thus was not always able to keep up. He so advised Bruns.

35. Furthermore, though it is not clear whether Bruns' "request" for greater care in the application of Locktite by Department 48 reduced the frequency of problems, it is clear that that request did not eliminate the problem.

36. Bruns then conferred with Department 48 again. It was agreed that the two (2) bolts would be installed by Sample in the future, thus eliminating the need for Sample to remove than at all. This occurred two (2) or three (3) days prior to Sample's discharge.

37. The effect of this change in the assembly process was not seen immediately since there were several IH Bogeys between Department 48 and Sample's station at the time the change was made.

38. At some time between the morning break and lunch time on July 26, 1976, the axles without bolts began to reach Sample's station. At this point, Bruns advised Sample of the change in procedure, told Sample he was to get the bolts and even gave him some bolts. The supply was located ten (2) or fifteen (15) feet from Sample's work station.

39. Later that morning, sometime between 11:00 and 11:30 am, Thompson was walking through the area and was told by an inspector that the Quick Release Valve and bracket were not assembled to the axle and therefore certain hoses were not attached.

40. Thompson immediately went to Sample and asked why the bracket and Quick Release Valve were not being bolted to the axle. Sample responded by stating that the air gun would not remove the bolts.

41. Thompson told Sample to use a wrench to remove the bolts when they were in the axle and assemble the brackets and valves.



42. Sample told Thompson that was not his job.
43. Thompson then went and reviewed Sample's "Man Assignment" apparently similar to a job description, to confirm that this was within Sample's assignment.
44. Thompson then went back and told Sample that the task was within his assignment. Sample told Thompson that he was not going to do it.
45. Thompson then advised sample that he was being given a direct order whereupon Sample requested the presence of his Union Steward. Thompson advised Sample that he would get the Steward.
46. Thompson then went and got Zumbrun the Steward, and advised him of the nature of the incident.
47. Zumbrun conversed with Sample outside of Thompson's presence and asked why the job was not getting done. Sample told Zumbrun the bolts were coming out hard. Zumbrun told Sample that he had to make an effort to remove the bolts. Sample told him that he would do so.
48. Zumbrun believed this agreement resolved the problem and therefore advised Thompson that the problem had been resolved. Both Thompson and Zumbrun left.
49. That afternoon, sometime after lunch and before the 2:00 pm break, Bruns was approached by Bob Biedenwig ("Biedenwig"), another foreman in Department 16 and asked about the problem with the Quick Release Valve and hoses, indicating that they were not being installed. Bruns told Biedenwig of his earlier conversation with Sample.
50. Bruns and Biedenwig then went and looked at several axles which had passed Sample's station. At the point where Sample was to install the bracket and Quick Release Valve, the axles they saw had no bolts, bracket, or valve installed. They decided to go see Sample.
51. Bruns and Biedenwig found Sample in the brake (not break) area sitting on a box or crate with his feet on a fifty-five (55) gallon metal drum containing trash (paper).

52. Biedenwig either tapped or hit Sample on his knee after verbal efforts to get his attention failed. In getting to his feet, Sample knocked over the trash can spilling some of the paper, apparently unintentionally.

53. Biedenwig told Sample to pick up the trash. While he was doing so, Biedenwig asked why the Quick Release Valve was not being installed. Sample's response was that he didn't have bolts. When Biedenwig told Sample to get the bolts, Sample replied that it wasn't his job. It was a Stockman's job. Biedenwig then gave Sample a direct order to get the bolts at least twice. Sample never indicated that he would get the bolts, at one point stating words to the effect that "you don't care about my pay; I don't care about your bolts." Biedenwig finally told Sample to come to the office.

54. There is insufficient evidence to find that a position of stockman or anything similar thereto existed at IH at the time.

55. A meeting was then arranged to be held in Department 16's office with Sample, Zumbrun, Biedenwig, and Department 16's General Foreman, Rex Coil ("Coil") to be present.

56. Zumbrun and sample conferred for a short time outside of the office before the meeting began.

57. When this meeting began, Coil gave Biedenwig and Sample, in that order, an opportunity to present their version of the incident.

58. After those sides of the story were presented, both Coil and Zumbrun asked Sample whether he was going to go get the bolts.

59. The first two times that he was asked by Coil, Sample responded with words to the effect that "I don't have to take this white supremacy." Coil advised Sample that continued refusal to go get the bolts would result in his being discharged for insubordination.

60. Sample never responded to Zumbrun's questions as to whether he was going to get the bolts.

61. Eventually, Coil told Sample he was going to ask him whether he would get the bolts one more time and that all he wanted in response was a yes or no. Sample said no.

62. Coil then told Sample that his time was stopped and that he was being discharged for insubordination. This occurred at 2:00 pm give or take a few minutes either way.

63. Had Sample agreed to go get the bolts, Coil would not have discharged him.

64. The only reason Coil discharged Sample was Sample's refusal to follow the order to go get bolts.

65. It was normal procedure at IH to convene a Disciplinary Review Meeting ("Review") as soon as possible after the discharge to consider whether that penalty was appropriate. A Review was convened to consider Sample's discharge, and commenced at about 3:30 pm on July 26, 1976.

66. Sample was present at said Review. Union representatives present at said Review were Hohn Yentes ("Yentes"), Chairman of Local 57's Grievance Committee, Zumbrun, and Goldsmith. Management representatives present were Coil, Biedenwig, R.M. Schram ("Schram"), Union Relations Supervisor, and John C. Daffara ("Daffara"), Labor Relations Analyst.

67. During the Review, Sample and Yentes were the primary spokesman for Sample, although Zumbrun also participated. The primary spokesman for IH was Schram, although Coil also participated. At the conclusion of the Review, it was management's determination that the discharge would be sustained.

68. Daffara's sole function at the Review was to take notes of the proceedings. Thereafter, he prepared a draft of minutes which was reviewed by other members of management. After such review was complete, the minutes were typed and distributed to various interested members of management and Local 57. Such minutes were prepared and distributed in the ordinary course of business by IH and copy of the minutes pertaining to the Review of Sample's discharge was admitted into evidence as Respondent's Exhibit K.

69. Though Local 57 protected Sample's discharge through the grievance procedure (discussed in greater detail below), at no point did Local 57 dispute the accuracy of the minutes.

70. When Sample's discharge was sustained after the Review, he was required to turn in his identification card. Coil and Sample then went to a locker of some sort where Sample picked up at least some of his personal belongings.

71. After picking up those items, Sample told Coil that he was going to stomp him. Coil did not respond.

72. Coil and Sample then went to the gate so that Sample could leave the premises. At the gate, Sample told Coil that as long as Coil remained in Department 16, he (Coil) would have to live in hell and that Sample would see to it that he did. Coil did not respond.

73. On Friday, July 30, 1976, Sample came to the premises and the guard at the gate, T.D. Bowman ("Bowman"), that he had come to get his paycheck. Bowman allowed Sample on the premises without requiring him to show an identification card. (It was apparently common practice for guards to let employees in on payday to get their checks without the usual "security" precautions of showing identification cards. It is not clear whether this practice was approved by IH).

74. Sample did not go to the Cashiers Office to get his paycheck. Instead he went to his former work station.

75. Thompson saw Sample there and went over and asked Sample what he was doing in the department. Sample showed Thompson his "visitors pass" and said that he wanted his check stubs which had been turned over to management regarding the alleged pay shortage. Thompson informed Sample that the stubs were in Union Relations.

76. Thompson then went to the Plant Protection Office to find out how Sample had gotten into the plant, where he talked with Bowman.

77. Bowman told Thompson that he (Bowman) had not realized that Sample had been discharged and that Sample's admission to the plant had been inadvertent.

78. Bowman made arrangements for someone to take his place at the gate and then went to get Sample out of the plant.

79. When Bowman arrived, Sample was facing the other direction talking to two or three men. Bowman tapped Sample lightly to get his attention.

80. In response, Sample told Bowman that he knew his rights, that Bowman was not supposed to touch him, and that he (Sample) ought to knock his head off.

81. In spite of this rather fiery beginning, Bowman was able to ascertain that Sample was at IH to get his paycheck and a check stub.

82. Bowman and Sample began to proceed to the Cashier's Office.

83. Before reaching that destination, Sample stopped in Department 16's office and asked about his check stub. Thompson told Sample that the check stubs were in the Union Relations Office with his file.

84. Eventually, Sample and Bowman proceeded to the Cashier's Office where Sample asked for his paycheck. A "young lady" in Bowman's words, gave Sample his check.

85. Sample immediately examined the paycheck, slammed his hand on a table or counter and said, *"The company fucked me again."*

86. When this "performance" did not achieve the desired effect, Sample repeated it.

87. The next location to which Sample and Bowman went was the Main Gate. Upon their arrival there, those who were present or who arrived shortly, included Anton J. Dolezal ("Dolezal"), Supervisor of Plant Protection and Safety, J. Jagger ("Jagger"), the guard who was called to relieve Bowman, Mr. and Mr. D. Treat, who were apparently planning to tour the plant, and Mr. Carl Boneff, who was with the Fort Wayne Union Railroad. Sample eventually left without any force having to be used but not before the following events occurred:

a. Sample asked Jagger if he wanted to fight, stating that Jagger should come out the gate with Sample and Sample would "beat his ass." Jagger's response was that he was a lover not a fighter.

b. Sample made a statement substantially as follows: "I seen the dirty look you gave me. I've got enough of this white supremacy shit. You white loving Christians burning crosses on people's lawns. Maybe you want to try burning a cross on my lawn. Just try it." It was unclear to whom this was addressed.

c. Addressing Jagger and Bowman, Sample said something like "Either one of you want to fight? Well, just come outside the Gate and I'll whip you asses."

d. Dolezal then advised Sample that he was a deputy sheriff. Sample responded saying that he was too, asking for Dolezal's name, and suggesting that maybe Dolezal wanted to be on Sample's list too. Dolezal gave Sample his name and spelled it for him.

e. Sample then questioned whether Dolezal really was a police officer, stating that he didn't see any badge. Dolezal handed Sample his badge and identification and Sample began to write on a folded piece of paper pulled from his shirt pocket.

f. While writing, Sample made a statement in substantially the following words: "I might as well put your name down on the list of people I'm going to sue. We'll see how you like it when you lose your home. I'm going to the Commission right away and file a complaint against a lot of you white supremacists who are discrimination against us black people."

88. On Tuesday, August 3, 1975, at approximately 11:00 am, Sample appeared in Daffara's office and wanted to see a union representative. Daffara told him he should contact union officials at Local 57's Union Hall. (The Union Hall was across the street.)

89. At approximately 3:00 pm that same day, Sample again came into Daffara's office. Daffara asked him what he was doing there.

90. Sample replied that officials at the Union Hall had sent him over to talk with Schaefer.

91. Daffara asked Sample to leave his office and IH property and told Sample that he would make sure Schaefer was contacted to meet Sample at the Union Hall at a later date.

92. Sample became angry and said something like, "you are prejudiced and a white supremacist and I will file discrimination charges against you."

93. Daffara again asked Sample to leave his office and the plant and got up to escort him out through the Employment. Office.

94. Sample then stated something like, "if you so much as brush up against me or bump me accidentally, I'll knock your block off."

95. Daffarra told Sample something like, “get the hell out of my office or I will call the guars.” Daffara then escorted Sample out of the plant through the Employment Office.

96. Local 57 timely filed a protest of Sample’s discharge in the normal manner in which discharges were subjected to the grievance procedure at IH.

97. With a week after Sample’s discharge, one or more representatives of Local 57 contacted Roger D. Bartholow (“Bartholow”), requesting that Sample’s discharge be modified. Bartholow said no, stating the refusal to be based on Sample’s attitude and conduct following the Review. Though this did not occur in any of the formal meetings contemplated by the grievance procedure, it was not unusual for grievances to be discussed outside the formal meetings.

98. The first formal step in the grievance procedure, as it pertains to a grievance relating to discharge, is referred to as a “Step two and a quarter (2¼)” meeting. Such meetings are requested by Local 57 and Local 57 provides IH with an agenda of grievances it wishes to discuss. Attending such meetings on behalf of IH would be the Human Resources Manager (IH’s principal spokesperson), the Labor Relations Manager, the Labor Relations Supervisors dealing with the relevant local union (IH is and was a party to more than one (1) collective bargaining agreement), and any Labor Relations Consultant dealing with that local union. Attending on behalf of Local 57 would be its principal spokesperson, a Regional Service Representative of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (“UAW”) out of Indianapolis, the Chairman of Local 57’s grievance committee, and all of the particular grievance’s committeemen.

99. The grievance pertaining to Sample’s discharge was discussed at a Step 2¼ meeting. IH maintained its position that the discharge was proper and should not be modified.

100. Typically, the next step, if Local 57 chooses to pursue the grievance, is for Local 57 to request a "Step two and a half (2½) meeting, listing the grievance on the agenda. If the timing is right, however, Local 57 may chose to make the grievance a part of the total bargaining picture during negotiations for a new collective bargaining agreement.

101. Such negotiations were occurring in the late summer and fall of 1976 and the Union chose to have this grievance considered during those tales. Again, IH maintained its position.

102. When a grievance is discussed but not resolved during negotiations, it may be carried over to the new contractual term only if IH agrees to do so. Though such agreements are rare, IH did agree to carry over the grievance pertaining to Sample's discharge.

103. When such grievances are carried over, the next formal step is the holding of a carry-over meeting where the grievance is discussed. The grievance concerning Sample's discharge was discussed as such a meeting. Again, IH maintained its position that the discharge should stand. This meeting occurred in January or February of 1977.

104. If the union wishes to pursue grievances which have not been resolved after a carry-over meeting, it must schedule them for a "pre-arbitration" proceeding. This grievance was not scheduled for such a proceeding by the union and the formal procedure thereby terminated.

105. The reason the IH refused to reinstate Sample was his threatening behavior subsequent to the Review toward several employees of IH.

106. Sample introduced Complainant's Exhibit G, which consists of various Review Minutes, memoranda, and arbitration decisions pertaining to thirty (30) IH discharges for insubordination and/or verbal abuse of supervision between October of 1967 and June of 1977. [Counsel for Sample repeatedly referred to thirty-one (31) discharges. Exhibit G, however, contains evidence of only thirty (30). Eddie Johnson who was reinstated by an Arbitrator's decision, has been counted as two (2) discharges.] This Exhibit does show that eighteen (18) of the twenty (20) whites were reinstated by IH while only two (2) of the ten (10) blacks



were reinstated. [An additional three (3) blacks were reinstated pursuant to an Arbitrator's decision while no whites were.] For reasons listed below, this fails to prove that IH's refusal to reinstate Sample was in any way affected by race.

- a. There is no evidence that any of the whites reinstated had conducted themselves in a manner comparable to the way Sample behaved following the Review.
- b. The numbers involved are too small to justify an inference that race must be the factor that causes the disparity.
- c. IN has a legitimate interest in minimizing like likelihood that its employees will have to deal with threatened or actual violence. While there is evidence that IH had reinstated employees who were alleged to have threatened or committed acts of physical aggression, those instances are significantly different from Sample's situation in the following ways:
  - i. There is no evidence of any white employee being reinstated by IH who made a threat after being discharged.
  - II. There is no evidence of any white employee being reinstated by IH who made threats of violence on more than one occasion, as did Sample.

107. Complainant's Exhibit F is a handwritten list, prepared by Sample, of the reasons he believes he was discriminated against. Though IH did not object to the admissibility of this document on the grounds that it was opinion evidence so as to preclude reliance on the document, the "evidence" is not persuasive anyway for these reasons.

- a. The evidence clearly is the opinion of a person who has not qualified as an expert on legal matters in general or civil rights law in particular; and
- b. On its face, and as discussed during Sample's testimony, the list does not explicitly state that the reasons listed are reasons why Sample believes he was discriminated against on the basis of race. Sample may well be using the phrase "discriminated against" as synonymous with "treated unfairly." While racial discrimination is certainly unfair treatment, all unfair treatment is not racial discrimination; and

c. The reasons offered are either not supported by the evidence or do not support a conclusion that Sample was discriminated against because of race. Specifically:

- i. Sample's claims of pay shortages were handled through normal procedures.
- ii. The order to go get bolts may have been unusual in a sense; however, its purpose was to make it easier for Sample to perform his duties. Furthermore,
- iii. Sample was not discharged for being a poor worker but for failing to comply with an order.
- iv. There is no evidence that any white worker who acted as Sample did following his discharge was reinstated.
- v. Had Sample answered either Coil or Zumbrun in the affirmative when they asked whether he would go get the bolts, he would not have been discharged. Thus, it could have made no difference to have a witness brought to the meeting.
- vi. The efforts made by IH to resolve the problems Sample was having in removing bolts did not constitute "harassment tactics." Though the first such effort was not totally successful and the second was apparently not to Sample's, liking these cannot reasonably be considered harassment
- vii. The reason for Sample's discharge never changed.

108. Sample also contended that he was used as an example by IH because they were having a lot of problems with production. It is difficult to credit this assertion since it was not support by any witness in a position to know what problems, if any, IH was having. If it were to be accepted as true, it would tend to show a reason other than race for which Sample was discharged.

109. Sample also claims that he could to possibly have gone and gotten the bolts while at the same time complying with the order to pickup the trash. This claim ignores the fact that Sample was not picking up trash in Department 16's office where he continued to refuse to go get bolts and the fact that in no case could picking up the trash have taken more than a few minutes.

110. Any Conclusion of Law which should have been deemed a Finding of Fact is hereby adopted as such.

### **CONCLUSIONS OF LAW**

1. Sample's complaint was filed prior to the expiration of ninety (90) days after the termination of a published and meaningful grievance procedure provided by IH and Local 57 and was, therefore, timely filed. IC 22-9-1-3(o).
2. ICRC has jurisdiction over the subject matter and the parties.
3. IH did not commit an unlawful discriminatory practice as that term is defined in IC 22-9-1-3(1) against Sample in regard to his pay for each of the following independent reasons:
  - a. IH did not fail to pay Sample any amounts owed him at the time those amounts were due to him.
  - b. There is no evidence that the shortages perceived by Sample, or the methods used by IH to investigate his claims of shortages, were affected in any way by race.
4. Even if IH had unlawfully discriminated against Sample with regard to pay ICRC could award no monetary relief therefore to Sample, since even Sample thinks he was paid, though belatedly, ICRC's authority to restore a Complainant's losses in employment cases includes only wages salary, or commissions. IC 22-9-1-6(k) (1).
5. Decision of federal courts interpreting Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §2000e, can and should be consulted in interpreting the Indiana Civil Rights Law. *Indiana Bell Telephone Company Incorporated v. Boyd* \_\_\_\_Ind. App.\_\_\_\_, 421 N.E.2d 660 (1981), *Indiana Civil Rights Commission v. Sutherland Lumber Co.* \_\_\_\_Ind. App.\_\_\_\_, 394 N.E.2d 949 (1979).
6. Those cases allocate the burden and order of proof in a case such as this in the following manner: plaintiff (here Complainant) must first establish a *prima facie* case; if that is done, the defendant (here Respondent) has the burden of

coming forward with evidence that the action complaint of was taken for a legitimate business reason which may be rebutted. See *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 5 FEP Cases 965 (1973), *Texas Department Community Affairs v. Burdine* \_\_\_U.S.\_\_\_\_, 101 S.Ct. 264, 25 FEP Cases 113 (1981).

7. Sample has not rebutted the evidence introduced by IH showing that his discharge was for a legitimate business reason, that reason being insubordination, either by showing that there is no basis in fact for finding that insubordination was the true reason for discharge or by showing that insubordination was a pretext for racial discrimination. Therefore, it must be concluded that IH did not commit an unlawful discriminatory practice when it discharged Sample.

8. Sample has not rebutted the evidence introduced by IH showing that the refusal to reinstate him was for a legitimate business reason, that reason being that Sample had threatened physical violence against employees of IH on more than one occasion subsequent to his discharge, either by showing that there is no basis in fact for finding that that was the true reason IH refused to reinstate Sample or by showing that that reason was a pretext for unlawful discrimination. Therefore, it must be concluded that IH did not commit an unlawful discriminatory practice by failing to reinstate Sample.

9. If ICRC, upon all the evidence, finds a person has not engaged in an unlawful practice, it must dismiss the complaint as to said person IC 22-9-1-6(k)(3).

10. IH is a corporation is therefore a "person" IC 22-9-1-3(a), cf. 910 IAC 1-1-1(A).

11. Any finding of fact which should have been deemed a Conclusion of Law is hereby adopted as such.

### **ORDER**

1. Sample's Complaint should be, and the same hereby is, dismissed.

**Dated: January 22, 1982**